

Removal Sale

11 Klondike Gloves, former price \$3, now 1 40
24 pr wool lined Gloves, former price \$1, now 35 cents
100 doz \$1 50, \$1, 75c Neckties, Rom plaids and stripes,
all styles now 50 cents
27 \$15 Black Worsted Dress Sack Suits reduced to \$10
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A Valuable Present Given away
To our Patrons
Every Monday Evening

Remnant Bargains

All linen Damask Towels, 21x50 inches, for week only
25 cents, worth 50.
\$3 50 Trousers now \$2 25. \$2 50 Trousers \$1 75
\$1 60 Trousers 90 cents Dickerson & Brown hats \$4 00
Fedoras from \$1 to \$3 50

The Emporium

SUPREME COURT DECISION.

IN THE SUPREME COURT OF THE STATE
OF NEVADA.

(No. 1518.)

IN THE MATTER OF THE
ESTATE OF M. D. FOLEY,
DECEASED.
MRS. OSCAR J. SMITH,
APPELLANT,
VS.
JOHN D. FOLEY,
JEREMIAH D. FOLEY,
EDMUND D. FOLEY,
ANNA D. FOLEY AND
JOHANNA FOLEY,
RESPONDENTS.

Appeal from the Judgment and Decree of
the Second Judicial District Court, in
and for Washoe County, in probate, dis-
tributing one-half of the property of
said estate to said respondents. Hon.
Chas. E. Mack, Presiding Judge.

W. E. F. Deal, Robert M. Clarke, Thomas
Wren and Charles A. Jones, Esquires,
for Appellant.
George W. Baker, R. R. Bigelow and T.
V. Julien, Esquires, for respondents.

OPINION BY—BONNIFIELD, J.

On the 26th day of July, 1894, M. D. Foley died intestate and without issue, seized and possessed of an estate, real and personal, situated in Washoe and Esmeralda Counties, State of Nevada, and leaving as his heirs at law, Minnie D. Foley, his wife, John D. Foley, Jeremiah D. Foley, Edmund D. Foley, his brothers, Anna D. Foley, his sister, and Johanna Foley, his mother.

On the 20th day of August, 1894, Minnie D. Foley was duly appointed administratrix of said estate and as such entered upon the duties of her office and continued therein until she intermarried with Oscar J. Smith, when, on the 16th day of May, 1895, W. E. Griffin was appointed administrator of said estate.

The inventory and appraisal of the property of the estate situated in Washoe County was filed August 12th, 1894, and did not disclose the character of said property, whether it was community or separate property. The property was appraised at the value of \$157,819.00.

On the 17th day of September, 1894, the appellant and respondents entered into a written agreement of which the following is a copy, to-wit:

"This agreement made and entered into this 17th day of September, 1894, by and between Jeremiah Foley, son of Mrs. Johanna Foley and brother of M. D. Foley, deceased, and John D. Foley, son of Mrs. Johanna Foley, and brother of M. D. Foley, deceased, and Edmund D. Foley, son of Mrs. Johanna Foley, and brother of M. D. Foley, deceased, and Anna D. Foley, daughter of Mrs. Johanna Foley, and sister of M. D. Foley, deceased, and Johanna Foley, mother of M. D. Foley, deceased, and Minnie D. Foley, surviving wife of M. D. Foley, deceased, (all of whom are heirs at law of said M. D. Foley, deceased, who died intestate at Reno, Nevada, on July 26th, 1894, and whose estate is now being administered upon by the District Court of the State of Nevada, Washoe County) WITNESSETH that said parties hereto, in consideration of the sum of one dollar to each in hand paid by the other do hereby covenant and agree, each with the other, that all the estate of said M. D. Foley, deceased, subject to distribution by said District Court, or by any other Court, in any other State or Territory, may and shall be distributed as follows: one-half thereof to Minnie D. Foley, surviving wife of M. D. Foley, deceased, and the other half thereof to be divided and distributed to Johanna Foley, mother of said deceased, Jeremiah Foley, brother of said deceased, John D. Foley, brother of said deceased, Edmund D. Foley, brother of said deceased, and Anna D. Foley, sister of said deceased, share and share alike. IN WITNESS WHEREOF"

On July 12th, 1895, the appellant, then Minnie D. Foley, filed her petition praying for a partial distribution of said estate, one-half to her and one-half to the respondents, as the heirs at law of said deceased, making no mention of the character of the property, whether community or separate property, or both. The Court set the hearing of this petition for

the 23rd day of September, 1895, but no hearing was ever had thereon. On December 31st, 1895, the appellant filed what was designated and treated as an "amended petition for partial distribution" of said estate, showing that since the filing of her original petition, she had intermarried with Oscar J. Smith.

The amended petition contains a list and description of what the petitioner claimed was community property, and it is alleged that all of said property belongs to the petitioner as the surviving wife of said M. D. Foley, deceased, and it contains a list and description of what she claimed was the separate property of the deceased and it is alleged that the petitioner and said other heirs, "have by an agreement in writing agreed that the said property be distributed, to-wit: the separate property shall be divided as follows, one-half thereof to your petitioner and one-half to the respondents, and petitioner prayed that the community property be set apart and delivered to her, and that the separate property be partially distributed among the heirs of said deceased, one-half to the petitioner and one-half to the respondents. To this petition is annexed the said agreement of date 17th day of September, 1894, and made part thereof. The respondents by their answer deny that any portion of said estate was or is community property and allege that the whole thereof was the separate property of the said M. D. Foley, deceased; deny "that as surviving wife of said M. D. Foley, deceased, the petitioner is entitled to all of the community property of which said M. D. Foley, deceased possessed, or of any of the property, either community or separate property owned by the said deceased at the time of his death, save and except the one-half of said property, whether same be community or separate, and in this behalf allege: that heretofore, to-wit: on the 17th day of September, 1894, and within sixty days after the death of said M. D. Foley, and after letters of administration upon the estate of M. D. Foley, deceased, had been duly issued out of this court to said Minnie D. Foley, now Mrs. Oscar J. Smith, the said petitioner herein, and these respondents entered into a written agreement with reference to the distribution of the estate of said M. D. Foley, deceased, which agreement is in words and figures following, to-wit: "The said agreement of 17th day of September, 1894, is set out in this answer.

They likewise allege that at the time of the execution of said agreement, the said estate and the whole thereof, was being administered upon in said District Court; that the whole thereof was then, ever since has been, and still is the subject of distribution by order of the Court; that said agreement was made and executed by the parties thereto for the purpose of settling any question of dispute that might arise between them as to the character of the property of the deceased, and for the purpose of saving the expense of any litigation growing out of an examination as to the character of said property, whether community or separate, and they pray that the whole of said estate, whether community or separate property, be distributed, after the payment of the debts; one-half thereof to Mrs. Oscar J. Smith, as the surviving wife of M. D. Foley, deceased, and the other half to the respondents, in accordance with the said agreement.

On the 9th day of February, 1897, upon consent and agreement of the parties hereto duly given and made in open Court, an undivided one-half of said estate was by order, judgment and decree of the Court distributed to the petitioner, Mrs. Oscar J. Smith, as the surviving wife and heir of said deceased. The question as to the character of the property of the estate, whether community or separate property, and all questions concerning the rights of the respective parties to the other half of the estate, were reserved by the Court for future hearing, consideration and determination.

On the 2nd day of July, 1897, the matters with respect to said questions and the rights of said parties, reserved as aforesaid, came on to be heard. It was stipulated and agreed by the counsel of the respective parties, in open Court, that the character of the property was as claimed to be and described in the petition of Mrs. Oscar J. Smith, except one hundred shares of the Spring Valley Water Stock, and that that was of the separate property.

It appears that the value of the community property greatly exceeds the value of the separate property. A jury was empaneled, and special issues framed and submitted to them for their answer, with respect to said agreement. The jury returned their answer to the several questions submitted to them, which the Court ratified, confirmed and adopted as its

findings on the questions submitted, and the Court found said agreement to be a full and complete settlement of all the property rights of said parties in said estate, in the proportion of one-half to the petitioner, Mrs. Oscar J. Smith, and the other half in equal shares to said respondents, and ordered, adjudged and decreed, that an undivided one-half of all the property of said estate, describing it, and including the community as well as the separate property, real and personal, "be and the same is, hereby distributed, to said Johanna Foley, John D. Foley, Jeremiah D. Foley, Edmund Foley and Anna Foley, share and share alike, upon the execution of a bond by them," etc. "for the payment to W. E. Griffin, administrator," etc. "of their proportion of the debts of said estate whenever required so to do, and of their proportion of the expenses of the administration of said estate."

From this decree Mrs. Oscar J. Smith, the surviving wife, appeals. The record presents twenty-six assignments of error, many of which have been elaborately and learnedly argued, and a great number of citations of authorities given by counsel of the respective parties. While we find these arguments and authorities are interesting and instructive, we deem it not necessary to pass upon many of the questions presented and discussed.

The paramount question is, whether the Court, in a proceeding for the partial distribution of the estate of the deceased, exceeded its authority in distributing to the respondents one-half of the whole estate, or whether the decree so distributing a part of the community property is erroneous?

The contention of counsel for appellant is, substantially, that in such proceeding no one but an heir, devisee, or legatee is entitled to petition for, or have distribution made to him, and that the Court is not clothed with legal authority to decree distribution to any other class of claimants; that with respect to the community property the respondents are not heirs, devisees or legatees, and hence, that in decreeing distribution to them of a portion of the community property, the Court exceeded its jurisdiction and erred in giving said decree.

Respondents' counsel maintain, in effect, that the respondents being interested in the estate under said agreement and as heirs, the statute gave them a right not only to appear and resist the application of the petitioner, but in addition, as heirs, to apply for distribution to themselves; that said agreement constitutes a sale and conveyance by each of these parties of all right, title and interest in an undivided one-half of the Foley estate, regardless of whether it was community or separate property; that said agreement was a compromise and settlement of all the questions that then existed, or might ever exist, between the parties concerning the property described in it; that the agreement embraces all the property, both community and separate property; that the Court had jurisdiction of said agreement, and of the subject matter and of the parties, and had authority to investigate and determine the rights of the respective parties as heirs, and their rights, under said agreement, and to make distribution accordingly, and that in so doing the Court did not exceed its jurisdiction, or err therein.

But "the Court may have jurisdiction of the subject matter, and of the parties, and yet the particular judgment rendered in the particular case may be void because in excess of the jurisdiction of the Court. The judgment rendered must be one that is authorized by law in the class of cases to which the case before the Court belongs."

Works on Jurisdiction of Courts, Sec. 8.

A judgment may be both erroneous and void (Id.). In *Windsor vs. McVeigh*, 93 U.S. 281, the Court said: "Though the Court may possess jurisdiction of a cause, of the subject matter, and of the parties, it is still limited in its mode of procedure and in the extent and character of its judgment. It must act judicially in all things, and cannot then transcend the power conferred by law."

In 6 Pat. 691 (U.S.) the Court defined jurisdiction to be "the power to hear and determine," and in *Ex Parte Reed*, 100 U.S. 13, it is defined "the power to hear and determine and give the judgment rendered."

The inquiry then is, did the Court have the power to hear and determine and give the judgment rendered with respect to the community property in this class of cases or this class of proceedings, a proceeding for the partial distribution of an estate?

"Although District Courts are now vested with jurisdiction in probate

matters, this jurisdiction, with some exceptions immaterial here, is to be administered under the same principles that formerly applied to the probate court, and under the same rules of practice, in fact, under the same Act." (Douglas vs. Folsome, 21 Nev. 447.)

The Court must be governed, in proceedings in probate matters, by the rules of practice prescribed by the probate act and must be governed by the provisions of said act as to the character and extent of the judgment or decree it may give in any particular matter or proceeding before it.

With reference to the partial distribution of estates of deceased persons said Act, Sec. 249, General Statutes, provides: "At any time after the lapse of four months after issuing of letters testamentary or of administration any heir, devisee or legatee may present his petition to the Court, that the legacy or share of the estate to which he is entitled may be given to him, upon his giving bonds," etc. Sec. 251. "The executor or administrator, or any person interested in the estate, may appear and resist the application, or any other heir, devisee or legatee, may make a similar application for himself." Sec. 252. "If at the hearing it appear that the estate is but little indebted and that the share of the party or parties applying may be allowed to him or them, without injury to the creditors of the estate, the Court shall make a decree in conformity with the prayer of the applicant or applicants, provided, etc."

As to final distribution, Sec. 257, "Upon the final settlement of the accounts of the executor or administrator, or at any subsequent time, upon the application of the executor or administrator, or any heir, legatee or devisee, or the grantee of the heir, legatee or devisee, the Court shall proceed to distribute the residue of the estate, if any, among the persons who are by law entitled to it." Sec. 259. "The decree may be made on the application of the executor, or administrator, or of any person interested in the estate."

The Legislature has declared when, on whose application, and to whom, distribution may be made, in proceedings for partial and final distribution, respectively. The Courts are authorized to act in pursuance of these statutory provisions, and not otherwise in the distribution of said estates. The respondents' claim to the one-half of the community property is based on said agreement, as grantees of the appellant. We are of opinion that under the above provisions, for partial distribution, none other than an heir, devisee, or legatee, having an interest, as such, in the property for which distribution is asked, is authorized to petition for such distribution; that the Court is not authorized to make such distribution to any claimant other than one entitled to the property as heir, devisee or legatee, and that the Court exceeded its jurisdiction and erred in its decree, distributing community property to the respondents.

The Agreement. A large portion of the arguments of counsel was devoted to their several contentions as to what property is embraced in said agreement, whether the separate property only, or both the separate and community property? This consideration and determination of this question were foreign to the proper subject matter before the Court, which subject matter was the partial distribution of said estate to the applicants as heirs, under the statute, and not as applicants, as grantees, as parties interested in the estate under and by virtue of said agreement, for, as we have shown above, as we think, distribution could not be properly made to the latter class of claimants in the proceedings then before the Court. So, then, it was not proper for the Court below to consider and determine the above question in that proceeding, nor proper for this Court to do so on this appeal.

Descents. There is contention between counsel as to the proper construction of Sec. 251 of the General Statutes, which provides: "When any person, having title to any estate not otherwise limited by marriage contract, shall die intestate, as to such estate it shall descend and be distributed subject to the payment of his or her debts, in the following manner: First, it is provided that the property shall descend to the surviving husband or wife and to the intestate's descendants, in certain specified proportions."

"Second. If he or she shall leave no issue, the estate shall go in equal shares to the surviving husband or wife, and to the intestate's father."

"Third. If there be no issue, nor husband, nor wife, nor father, then in equal shares to the brothers and sisters of the intestate, and to the children of any deceased brother or sister, by right of representation; provided, that if he or she shall leave a mother, also, she shall take an equal share with the brothers and sisters."

We are clearly of opinion that it was not the intent of the legislature, that if the intestate leaves no issue and no father the surviving husband or wife shall take none of the estate, but that the intent was that one-half of the property shall descend and be distributed, subject to the payment of said debts, to the surviving husband or wife, and the other half to the intestate's brothers and sisters and to the children of any deceased brother or sister by right of representation, provided, if the intestate shall also leave a mother she shall share equally with the brothers and sisters. We therefore conclude that under this statute the appellant and all the respondents are heirs of said deceased with respect to said separate property, and in the proportion above named.

The judgment and decree appealed from are reversed.

We concur: BELKNAP, C. J.
MASSEY, J.

Filed January 24, 1898.
EUGENE HOWELL,
Secretary of State and ex-officio Clerk of the Supreme Court.

Filed with printer for publication January 25, 1898. Eugene Howell.

ADMINISTRATORS' SALE.

In the District Court of the First Judicial District of the State of Nevada, Ormsby County.

In the matter of the estate of Oliver Longabaugh, deceased.

Notice of sale of real and personal property at either public or private sale NOTICE IS HEREBY GIVEN, that in pursuance of an order of sale made and entered on the 15th day of January, 1898, in the matter of the estate of Oliver Longabaugh, deceased, the undersigned, administrator of said estate, will sell at either public or private sale, and receive sealed bids, subject to confirmation by said Court, the following described real and personal property.

One-half interest in the northwest 21 feet of the southeast 51 feet of lot No. 1, Block No. 3, known as the Thomas Beer building, and one-half interest in the Hope building and the lot of ground commencing at the southeast corner of Block 3, lot No. 1, thence northeasterly 60 feet; thence southeasterly 50 feet; thence southeasterly 60 feet; thence northeasterly to point of beginning, situated at Empire, Nevada.

One-half interest in general merchandise store, three houses, one buggy, small lot of hay, book accounts, Ormsby County warrant for a small amount and small lot of wood. Full particulars given by undersigned on application.

Sealed bids will be received up to, and sale will take place on Thursday, February 17, 1898. The real estate will be sold at the Court House door, Ormsby County Nevada, at 11 A.M. of said day, and the personal property will be sold at the store of Longabaugh & Co., Empire Nevada, at 3 o'clock P.M. of said day.

Terms of sale, cash.
SAMUEL LONGABAUGH,
Administrator of the estate of Oliver Longabaugh, deceased.
Dated January 18, 1897. 3w.

Dr. J. C. Hennessy,
DENTIST

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